

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SALLY FIGUEIREDO,)	
)	
Plaintiff(s),)	No. C 09-4784 BZ
)	
v.)	ORDER GRANTING DEFENDANT'S
)	MOTION TO DISMISS
AURORA LOAN, et al.,)	
)	
Defendant(s).)	
)	
_____)	

Before the Court is defendant's motion to dismiss plaintiff's first amended complaint ("complaint") under Federal Rule of Civil Procedure 12(b)(6) and to expunge a lis pendens under California Code of Civil Procedure Section 405.31. The complaint fails to address several threshold issues. Finding no need for oral argument, defendant's motion to dismiss is **GRANTED** with leave to amend **IN PART** and **GRANTED** without leave to amend **IN PART**. Defendant's motion to expunge the lis pendens is **DENIED WITHOUT PREJUDICE**.

The complaint alleges five causes of action: (1) violation of California Civil Code § 2923.5; (2) fraud; (3) intentional misrepresentation; (4) violation of California

1 Civil Code § 2323.6; and (5) violation of California Civil
2 Code § 1572.¹ Plaintiff originally sought modification of a
3 mortgage secured by a piece of residential property. Since
4 plaintiff filed this complaint, the property has been sold at
5 a trustee's sale.

6 Plaintiff's first cause of action suffers from at least
7 one basic defect. Section 2923.5 of the Civil Code only
8 applies to "mortgages or deeds of trust recorded from January
9 1, 2003, to December 31, 2007, inclusive, that are secured by
10 *owner-occupied* residential real property

11 'owner-occupied' means that the residence is the principal
12 residence of the borrower as indicated to the lender in loan
13 documents." Cal. Civ. Code § 2923.5(i) (emphasis added). The
14 complaint does not allege that the subject piece of property
15 was ever "owner-occupied." Defendant pointed out this defect
16 in its motion to dismiss. Motion at 3.

17 Plaintiff, in her opposition, does not counter this
18 argument and instead asks the court to presume that the
19 property was owner-occupied simply because she "alleged that
20 she is protected under" the statute. Opp. at 5. This is too
21 much of a bootstrap. Plaintiff's failure to allege whether
22 the property was owner-occupied can be solved by simply
23 stating so in the complaint. It is plaintiff's obligation to
24 plead facts sufficient to state a plausible claim for relief.

25
26 ¹ As filed, plaintiff's first amended complaint omits
27 pages 11-14. Doc. No. 20. Defendant's motion does not address
28 any of the causes of action contained in the missing pages,
including the second and third causes of action. Plaintiff re-
filed the complete complaint after this motion was fully
briefed. Doc. No. 35.

1 See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1955 (2009). The
2 Court will not presume facts that plaintiff failed to allege
3 in order to defeat a motion to dismiss. If plaintiff cannot
4 allege that the property was owner-occupied consistent with
5 her obligations under Rule 11, then plaintiff cannot state a
6 cause of action under Section 2923.5.

7 Defendant's preemption argument and other challenges to
8 the first cause of action are best resolved after plaintiff
9 addresses the Court's concern about owner-occupancy.

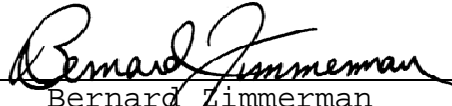
10 Plaintiff's fourth cause of action for violation of
11 Section 2923.6 of the Civil Code fails because that section
12 does not provide a private right of action to borrowers. See
13 Reynoso v. Chase Home Finance, 2009 WL 5069140, *4-5 (N.D.Cal
14 2009) and cases collected therein. Plaintiff has not cited,
15 and this Court has not found, a single case holding that a
16 borrower has a private right of action under this section.
17 This cause of action is **DISMISSED WITHOUT LEAVE TO AMEND**.

18 The fifth cause of action under Civil Code Section 1572
19 presents the same problem as the second and third causes of
20 action. Plaintiff argues that this cause of action
21 incorporates paragraphs 32-50 and 63-69 of the complaint.
22 Paragraphs 32-50 were not included in the operative version of
23 the complaint.

24 **IT IS ORDERED** that defendant's motion to dismiss is
25 **GRANTED WITHOUT LEAVE TO AMEND** as to plaintiff's **FOURTH** cause
26 of action. Defendant's motion is **GRANTED WITH LEAVE TO AMEND**
27 as to the remaining causes of action. Plaintiff **SHALL** file an
28 amended complaint by **MARCH 25, 2010**. Defendant's motion to

1 expunge the lis pendens is **DENIED WITHOUT PREJUDICE** to being
2 renewed if defendant moves to dismiss plaintiff's amended
3 complaint. The hearing scheduled for **MARCH 17, 2010** is
4 **VACATED.**

5 Dated: March 15, 2010

6 
7 Bernard Zimmerman
United States Magistrate Judge

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